

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,

No. 37765-9-II

Appellant,

v.

KRISTY LENA WILLIAMS,

Respondent.

UNPUBLISHED OPINION

Schultheis, J. — Kristy Lena Williams was charged with assaulting a health care worker. The State appeared before the trial court on 11 occasions over 10 months for trial continuances for various reasons and the majority of continuances were granted over Ms. Williams' objection. Ms. Williams sought only one continuance. The State's eleventh appearance for a continuance was to accommodate the work schedule of the complaining witness. The trial court denied the continuance and dismissed the case on Ms. Williams' motion. The State appeals the dismissal. We conclude that the court's dismissal was not an abuse of discretion. We therefore affirm.

On July 23, 2007, probable cause was found to charge Ms. Williams with third

degree assault of a health care worker, RCW 9A.36.031(1)(i), on the allegation that she “punched a nurse in the face and chest when he was attempting to give [her] medical assistance.” Report of Proceedings (RP) at 1. A public defender was appointed, the arraignment was set for August 7, and bail was set to secure her appearance.

Ms. Williams appeared on August 7 for her arraignment/first appearance with retained counsel. Ms. Williams, who was not in custody, pleaded not guilty to the assault charge and asserted a self-defense claim. She was ordered to appear for pretrial on September 11, and for her jury trial on October 24.

On October 18, the State moved for a continuance because of a medical condition associated with the assigned deputy prosecutor’s pregnancy. The continuance was granted. Ms. Williams signed a speedy trial waiver to expire on January 18, 2008. The trial date was scheduled for January 14, with a pretrial on January 10.

Because discovery issues threatened to derail the trial schedule, on January 8, 2008 Ms. Williams decided to forego taking the perpetuation deposition of a favorable physician/witness in order to proceed to trial as scheduled. The State then moved for a continuance at the pretrial conference on January 10 because the deputy prosecutor thought that Ms. Williams would be seeking a continuance for the deposition and now the deputy prosecutor was not prepared to go to trial. Ms. Williams expressed her desire to go to trial as soon as possible. Ultimately, Ms. Williams’ trial could not go forward as scheduled on

January 14 because another case on the docket had priority and there was only one judge available. The parties agreed to a trial date of February 13, based on the parties' schedules and to accommodate the new deputy prosecutor who would be taking over the case when the currently assigned deputy departed for maternity leave on February 15. Review was scheduled for February 7. Ms. Williams reluctantly signed a speedy trial waiver.

At the pretrial hearing on February 7, Ms. Williams indicated she was ready for trial as scheduled on February 13. The State moved for a continuance, indicating that it had another case to be called and confirmed for that day and would have insufficient time to review discovery it had just received. Ms. Williams objected. The court decided to reset the case for review on February 12 and determine at that time if a judge was available.

On February 12, the parties appeared before a court commissioner and the deputy prosecutor reiterated her request for a continuance. She had filed a motion and affidavit asserting that after she reviewed the discovery, she determined that additional witnesses would need to be subpoenaed. Further, in light of her pregnancy, she would not be able to try a case until late June and needed additional time of three weeks to accommodate reassignment to another deputy. The State indicated that the speedy trial period would not expire until April 8. Ms. Williams objected to the continuance and explained that she could not return to her job as an emergency medical technician until and unless she was cleared of the charge. The trial was continued over defense objection because, the court

found, there were no courtrooms available and for the reasons cited by the deputy prosecutor. The trial was scheduled for March 19, a date the parties agreed to, with a pretrial of March 13.

At the pretrial on March 13, the deputy to whom the case was newly reassigned asked for a continuance because he was retrying a case that resulted in a hung jury and one of the State's witnesses was unavailable. Over Ms. Williams' objection, the court granted the continuance. The trial was set for April 17 and pretrial of April 16.

On April 9, the parties appeared on Ms. Williams' motion for a continuance because defense witnesses would be out of the country. The trial court set the trial for May 19 and pretrial on April 23.

At the pretrial on April 23, the deputy prosecutor indicated that for unknown reasons a doctor/witness would be unavailable on the trial dates. The court ruled that, based on the information presented, it could not find good cause for a continuance and ordered the case to trial on May 19. The parties were instructed to provide witness lists by April 28.

When the parties appeared on May 7 to address the witness lists, the deputy prosecutor again requested a continuance, indicating that the doctor who was unavailable for trial on May 19 was going to be on vacation. The court indicated:

Looking at the file, I think there have been -- I see five continuances granted to the State at the State's request for one reason or another. I am real

nervous about the notion that I can or should grant another one. I am certainly not willing to consider it on the basis that well, we will come back in a few weeks. We have had more than enough time to go to the witnesses and get a schedule. I'll come back to it later in the docket if you wish but we are way past the point where we should be saying, you know, let's round up another ninety days and then we will talk about actually getting a date.

RP at 60.

Ms. Williams offered to attend a perpetuation deposition to resolve the State's witness issue if it would assure her the scheduled trial date. The court instructed the State to contact its witnesses to determine their available dates and return later on the docket.

When the matter reconvened, the State indicated that it was able to contact only four of its eight witnesses and each had multiple days that they were unavailable, but the doctor was the only witness unavailable on May 19. Ms. Williams objected to a continuance to accommodate the doctor's schedule, as the doctor's testimony would be repetitive of other evidence. The court denied the motion for continuance, commenting:

I am also really concerned at this point -- we have had five prior continuances at the State's request. I assume there was good cause for each one but I think we are setting ourselves up for problems at this point if I grant another continuance. At this point, I am going to suggest that there be a perpetuation deposition of that witness. If Counsel want to arrange that right now and come back up if there is any issue about date or time I will address that today so that we can but based on the record in front of me I don't think I can grant a continuance.

RP at 64.

On the trial date of May 19, the State moved for a continuance because the deputy

prosecutor was in another trial. Ms. Williams adamantly objected, suggesting that another deputy must be available to try the case. She made an oral motion to dismiss “[i]n the interest of justice.” RP at 67. The court noted that, aside from the deputy issues, there were no judges available to hear the case. The court instructed Ms. Williams to make her motion to dismiss in writing and set the hearing for May 21.

On May 20, Ms. Williams filed a written motion and affidavit for dismissal with prejudice. Ms. Williams relied on CrR 8.3 (dismissal for prosecutorial mismanagement) and *State v. Chichester*, 141 Wn. App. 446, 457-59, 170 P.3d 583 (2007) (dismissal for State being unprepared for a scheduled trial).

The parties appeared for the hearing on May 21. The judge ruled that the case would be continued for five days due to court congestion. The judge set the trial for May 27, declaring that the case would be heard regardless of witness availability. The deputy prosecutor responded, “Tuesday it will be.” RP at 78.

On May 23, the judge called the parties to court because he understood that the State wanted another continuance due to witness unavailability. The State explained that the complaining witness would be out of town until June 8. The deputy asked that the trial be continued until June 9 or 11. He informed the court that “the State doesn’t want to proceed without this [complaining] witness.” RP at 81.

Ms. Williams argued that the case was already outside of the speedy trial time and it

was set for May 27 under an extension because no judge was available.¹ Further, counsel argued, the State's repeated requests for continuances for witness unavailability were unfair because the State endorsed so many witnesses, many of whom either had repetitive information or lacked firsthand information, that it would always be highly likely that at least one witness would have a scheduling conflict. Ms. Williams renewed her motion to dismiss.

The court struck the trial scheduled for May 27 and asked the State to provide the details concerning the complaining witness' availability and set Ms. Williams' motion to dismiss for May 28.

On May 27, the State filed a motion and affidavit for a continuance under CrR 3.3(f)(2). The State explained that its complaining witness would be unavailable to testify on May 27 because he was working in Astoria, Oregon, from May 27 to May 28 and in Vancouver, Washington, from May 29 to June 6.

At the hearing on May 28, Ms. Williams, relying on *Chichester*, 141 Wn. App. at 457-59, argued that dismissal was appropriate. The court ordered dismissal, reasoning:

The backdrop of this case and the backdrop of my current analysis is there have been approximately and I don't know if these numbers are exact but approximately eight continuances and approximately six of those were at the request of the State. The matter was continued to the 27th for trial. For the

¹ Ms. Williams does not base her argument on appeal upon the speedy trial rules. See CrR 3.3. We therefore make no observations regarding the continuances as they relate to speedy trial rules and we make no determination based upon those rules.

27th, the State indicated that their witness was unavailable. So that trial date was struck and put over to now to determine where we go from here. The basis for the unavailable -- unavailability appears to be merely that the individual was working in Astoria. Astoria is approximately one hour from here. It is routine for people who live here to go there for dinner. It is not some far off location, number one. Number two, I was scheduled to go to work that day can't be considered as good cause. Given that the courts work Monday through Friday, if "I have got to work" were a good cause to continue a trial we would never try a case. We would never have a jury. So there was no good cause not to go to trial on the 27th. I will grant the motion to dismiss.

RP at 87-88.

The court entered an order, which relevantly read:

The State's motion for a continuance is denied as to the trial date of 5/27/08. No good cause appearing for continuance from 5/27/08. Findings of fact and conclusions of law to follow! Case dismissed with prejudice.

Clerk's Papers at 53.

The State appeals.

Ms. Williams argues two alternate theories for dismissal—CrR 8.3 and *Chichester*, 141 Wn. App. 446. Both theories were argued before the trial court. It is unclear, however, upon which theory the trial court rested the dismissal. Nonetheless, we may affirm on any ground the record supports. *State v. Michielli*, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997). We conclude that each theory presented by Ms. Williams is supported by the record and justifies dismissal.

CrR 8.3(b) governs dismissals of criminal actions for governmental misconduct.

The rule provides:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

The rule also requires that the court set forth its reasons in a written order.

CrR 8.3(b). The written order here did not set forth the reasons but directed the preparation of findings of fact and conclusions of law, which was not done. The record is, however, sufficient to permit review. *See State v. Smith*, 145 Wn. App. 268, 274, 187 P.3d 768 (2008).

A trial court's decision on a motion to dismiss under CrR 8.3(b) is reviewed for an abuse of discretion. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

"That dismissal under CrR 8.3 is an extraordinary remedy also counsels against allowing dismissal based on speculative prejudice." *State v. Stein*, 140 Wn. App. 43, 57, 165 P.3d 16 (2007) (citing *Rohrich*, 149 Wn.2d at 658). The criminal defendant therefore "bears the burden of proving both misconduct and prejudice by a preponderance of the evidence." *Id.* at 53 (citing *Rohrich*, 149 Wn.2d at 654). The prejudice must affect the defendant's rights to a fair trial. *State v. Baker*, 78 Wn.2d 327, 332-33, 474 P.2d 254

(1970).

Governmental mismanagement giving rise to dismissal under CrR 8.3(b) does not require evil or dishonest acts; simple mismanagement is enough. *Michielli*, 132 Wn.2d at 239. For instance, in *State v. Stephans*, 47 Wn. App. 600, 604, 736 P.2d 302 (1987) the misconduct element was met under the circumstances that witnesses disobeyed a court order, there was no indication that the State was ready for trial, and no remedy would have served the interest of justice short of dismissal. Similarly, in *State v. Sulgrove*, 19 Wn. App. 860, 863, 578 P.2d 74 (1978), the court found that the State's conduct in charging the wrong crime, amending the information to correct it the day before trial after defense counsel moved for dismissal, and failing to produce necessary evidence to support the correct charge on the day of trial, was sufficiently careless to constitute misconduct and grounds for dismissal in the furtherance of justice.

Here, Ms. Williams met her burden of demonstrating misconduct, given the State's failure to marshal its evidence for the day of trial. Mismanagement of this nature is subject to dismissal under CrR 8.3(b).

Ms. Williams has also demonstrated prejudice in the presentation of her case because proceeding without the complaining witness, the person she was alleged to have assaulted, would have deprived her of her constitutional right to confront her accuser. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *Olden v. Kentucky*, 488 U.S. 227, 232, 109 S.

Ct. 480, 102 L. Ed. 2d 513 (1988); *California v. Green*, 399 U.S. 149, 157-58, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970); *State v. Guloy*, 104 Wn.2d 412, 424, 705 P.2d 1182 (1985). Further, it is reasonable to assume that Ms. Williams' claim of self-defense would have been less effective without the ability to cross-examine the complaining witness and permit the jury to assess his credibility in the presentation of his version of the events.

Alternatively, Ms. Williams relies on *Chichester*, 141 Wn. App. 446. There, the appellate court found that the trial court did not base its dismissal of the case on prejudice by arbitrary action or governmental misconduct under CrR 8.3(b). Instead, the dismissal was for the reason that the prosecutor was not ready to proceed with a trial on a confirmed trial date. *Id.* at 457.

In *Chichester*, the State confirmed at the readiness hearing that it was prepared to go to trial on Wednesday and Thursday of the upcoming week. *Id.* at 449. The trial court then set the trial calendar for eight cases based on the stated availability of the parties and witnesses. *Id.* After the trial court announced the entire calendar, the deputy prosecutor informed the court that there was only one deputy available to try multiple cases on the same day. *Id.* The trial court reminded the deputy that the calendar was set based on dates provided by the State, and that the court would not be inclined to find good cause when the State could make arrangements for coverage. *Id.* at 450.

Nonetheless, the State appeared on the morning of trial with a motion to continue

and no alternative plan. *Id.* at 451. Because two prosecutors presented the motion, the trial court suggested that each of them try one case. *Id.* The State rejected this idea because one attorney was acting as a supervisor for the other, who was trying a different case that day, and the State had an office policy requiring supervision of new attorneys. *Id.*

The trial court denied the motion for a continuance and dismissed the case on the defendant's oral motion. *Id.* at 453.

On appeal, Division One of this court held:

We do not believe CrRLJ 8.3(b) is the controlling rule where the State comes to court on the date of trial unready to proceed after being unable to show good cause for a continuance. To hold that the court in such a situation cannot dismiss the case, but must instead grant another continuance, would mean that control of the court's criminal trial settings would be transferred to the State. The mere filing by the State of a last-minute motion to continue would routinely serve to dislodge a confirmed trial date, so long as there was time left in the speedy trial period. Surely this was not intended by the drafters of the rule.

Id. at 458.

The appellate court noted that the State still had the opportunity to begin the trial with the supervising deputy prosecutor or "to propose some other deployment of resources consistent with the trial date." *Id.* And, "[i]nstead of objecting to a dismissal, the State declared itself unready to proceed and virtually invited the court to grant the defense motion." *Id.* The same is true here.

The trial court in Ms. Williams’ case denied the State’s motion for a continuance because the circumstance of a complaining witness working out of town was insufficient to justify a continuance. The court observed that the town in which the witness was working was only an hour away and a work schedule cannot make a witness unavailable for a trial because trials are held during the majority of witnesses’ workdays. The deputy prosecutor expressed his position that he would not try the case without the complaining witness.² Similar to *Chichester*, the deputy prosecutor in this case was unprepared to try the case on the designated day. And as in *Chichester*, “Because the State was not ready to proceed, the case would have necessarily failed for lack of evidence if the court had called it for trial. Granting the defense motion to dismiss simply recognized that reality.” *Id.* at 459. In this case, the trial judge noted, “I got third hand information yesterday that *the State was not going to be ready to proceed* because of a missing witness.” RP at 80 (emphasis added). The dismissal here likewise recognized the reality of the State’s unpreparedness and its position that it would not try the case without the witness.

At the time of trial in *Chichester*, the rule-mandated speedy trial time had not

² The State reiterates this position on appeal. In its opening brief, the State notes, “On May 23, 2008, Judge Warning reviewed the . . . case because the State *would be unable* to try the case on May 27, 2008.” Appellant’s Br. at 10 (emphasis added). Later, the State explained, “[T]he State notified the court that it *could not* try the . . . case on May 27, 2008,” because of the complaining witness’ work schedule. Appellant’s Br. at 15 (emphasis added).

expired. 141 Wn. App. at 449. The defendant in *Chichester*, who was being tried for driving under the influence, was missing work to be present for the confirmed trial date and, because his license was suspended, he had to enlist the assistance of a friend to drive him from southwestern Washington to Bellevue for trial. *Id.* at 455. The trial court found prejudice to the defendant in *Chichester* because of trial preparation, travel, and further delay. *Id.* at 453. Ms. Williams was similarly prejudiced. She had been ready for trial almost consistently for 10 months and sought only 1 continuance, while the State sought 11. She could not work in her chosen career due to the charge and was working cocktail waitress shifts pending trial. Ms. Williams' attorney gave up an opportunity to spend time with his son (who lived out of state) to work over a weekend to prepare for another confirmed trial date of May 19, and even though the State knew the case would not be called, the State did not give him the courtesy of a phone call before the weekend. Ms. Williams objected to the majority of the continuances and became increasingly adamant about having the matter tried as scheduled as time marched on.

The trial court did not abuse its discretion in ordering dismissal.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

No. 37765-9-II
State v. Williams

Schultheis, J.

WE CONCUR:

Bridgewater, J.

Hunt, J.